Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1444

VINCENT DE CARLO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Respondent, the State of New Jersey, respectfully prays that the Writ of Certiorari sought by Petitioner to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on September 21, 1978, be denied.

Opinions Below

The following proceedings of the state courts are reproduced in the Petitioner's appendix: the order of the Supreme Court of New Jersey denying certification, not yet reported; the opinion of the Superior Court of New Jersey, Appellate Division, reported at 162 N.J. Super. 174, 392 A.2d 615 (App. Div. 1978); and the opinion of the Superior Court of New Jersey, Law Division, reported at 156 N.J. Super. 249, 383 A.2d 769 (Law Div. 1978).

Statutes Involved

N.J.S.A. 2A:135-9

> Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdismeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.
>
> If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture.

N.J.S.A. 2A:98-1 (a), (e), (f) and (h)

> Any 2 or more persons who conspire:
>
> a. To commit a crime; or
>
> • • •

> e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
>
> f. To obtain money by false pretenses; or
>
> • • •
>
> h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—
>
> Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

N.J.S.A. 40A:11-1

> This act shall be known and may be cited as the "Local Public Contracts Law."

N.J.S.A. 40A:11-4

> Every contract or agreement, for the performance of any work or the furnishing or hiring of any materials or supplies, the cost or the contract price whereof is to be paid with or out of public funds, not included within the terms of section 3 of this act, shall be made or awarded only by the governing body of the contracting unit after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law. No work, materials or supplies shall be undertaken, acquired or furnished for a sum exceeding in the aggregate $2,500.00, except by contract or agreement.

Counter Statement of Question Presented

1. Whether a public employee was denied due process when he was removed from office upon a legal determination that his conspiracy conviction involved moral turpitude.

Counter Statement of the Case

Pursuant to U.S.Sup.Ct. Rule 40-3, 28 U.S.C.A., Respondent respectfully submits the following additions and corrections to Petitioner's Statement of the Case.

Hudson County Indictment No. 65-72 charged Vincent De Carlo and two codefendants, Paul J. Lombardo and James E. Lagomarsino, with a series of offenses stemming from construction work performed by De Carlo Contracting Co., Inc. for the City of Union City, New Jersey. Lombardo and Lagomarsino were the Director of Public Safety and the Director of Revenue and Finance, respectively, of Union City. De Carlo was a police officer in North Bergen, New Jersey.

Count I of the indictment charged all three defendants with conspiracy to "pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids, and public bidding on public contracts, [citations omitted], to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office by public officials [citation omitted], and to cheat and defraud the City of Union City of money and property by false pretense and cheat . . .," contrary to N.J.S.A. 2A:98-1(a), (e), (f) and (h).

Count I listed 19 overt acts supporting the conspiracy. The first nine overt acts specified that Lombardo had authorized De Carlo, without public bidding, to perform

repair work in the office of the Detective Bureau Commander; that the repairs were duly completed; that De Carlo submitted two payment vouchers in the amounts of $2475 and $2435; that Lombardo certified both of these vouchers as to their necessity and propriety; and that De Carlo was thereafter paid. The next six overt acts specified that without prior bidding Lombardo had authorized De Carlo to perform repairs on the Public Works Building, "well knowing that said repairs would and did cost in excess of $2,500.00."* Thereafter, it was alleged, De Carlo supervised the project, submitting vouchers to the city for work in excess of $7000, which Lombardo certified. Lombardo also allegedly certified "the claims of divers subcontractors and suppliers for services and materials" used in the Public Works Building, and totalling over $11,000. For his part, Lagomarsino was charged with certifying to the propriety of an additional $5500 of claims, by falsely alleging that they had been furnished to his department, rather than to Lombardo's. In overt act 17, Lagomarsino was charged with approving for payment claims vouchers worth $24,000. In overt acts 18 and 19, De Carlo was charged with ordering, receiving, and appropriating for his own use $9000 worth of lumber, while directing the supplier to submit the bill to Lombardo.

Count II charged Lombardo with misconduct in office for authorizing De Carlo to perform repairs costing in excess of $2500 in the Detective Bureau Commander's office, without adhering to the public bidding laws, contrary to N.J.S.A. 2A:85-1.

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* The figure $2500 is significant, since a municipality may not contract for work or supplies in excess of $2500 unless there has been prior public advertisement for bids. N.J.S.A. 40:50-1 (prior to July 1, 1971); N.J.S.A. 40A:11-4 (effective July 1, 1971).

Count III charged Lombardo and Lagomarsino with misconduct in office for authorizing De Carlo and various subcontractors to furnish services and materials in excess of $2500 for the repair of the Public Works Building, without adhering to the public bidding laws, in violation of N.J.S.A. 2A:85-1.

Count IV charged De Carlo and Lombardo with obtaining property by making false representations to Taffaro Lumber Co. and Union City, with intent to cheat and defraud the company and the city, contrary to N.J.S.A. 2A:111-1.

Trial of all three defendants was held before the Honorable James H. Dowden, J.C.C., and a jury, on January 16 to February 8, 1974. Following the presentation of the State's case, the court dismissed Count IV and struck the language from Count I which charged the defendants with "cheating and defrauding the City of Union City." Following the defense case, the court acquitted Lagomarsino of all charges.

The jury deliberated and found De Carlo and Lombardo guilty of conspiracy, and Lombardo guilty of both counts of misconduct in office.

Both Lombardo and De Carlo made motions for new trials which were heard before Judge Dowden on March 15 and 25, 1974. Their motions were granted. Thereafter, the Superior Court, Appellate Division, granted the State's motion for leave to take an interlocutory appeal, reversed the order granting a new trial, reinstated the jury's verdicts, and remanded for sentencing. *State* v. *Vincent De Carlo and Paul J. Lombardo,* No. A-2548-73 (App. Div., Feb. 23, 1976). On May 18, 1976, the New Jersey Supreme Court denied defendants' motion for leave to appeal.

On December 21, 1976, Judge Dowden sentenced De Carlo to a suspended one year term in Hudson County Jail, and imposed one year of probation and a fine of $1,000. This conviction was affirmed by the Appellate Division. *State* v. *Lombardo, Lagomarsino and De Carlo,* No. A-1838-76 (App. Div., Jan. 17, 1978).

Petitioner was advised on December 29, 1976 by the North Bergen Director of Public Safety that his position as a police officer was deemed to have been forfeited by virtue of his conviction of a crime involving moral turpitude. At Petitioner's request, an administrative hearing was held on January 5 and 11, 1977. The Director thereafter reversed himself and, on January 14, 1977, issued a written opinion reinstating defendant as a North Bergen police officer (A.1).

The present action was commenced by the Hudson County Prosecutor on August 2, 1977. After hearing argument from the parties, the court issued a written opinion and entered judgment declaring De Carlo's office forfeit, on the theory that his conviction for conspiracy evinced moral turpitude. This judgment was affirmed by the Appellate Division and thereafter the New Jersey Supreme Court denied certification. *O'Halloran* v. *De Carlo,* 156 N.J. Super. 249, 383 A.2d 769 (Law Div.), aff'd *per curiam* 162 N.J. Super. 174, 392 A.2d 615 (App. Div.), certif. den. —— N.J. ——, —— A.2d —— (1978).

The present Petition for Writ of Certiorari was docketed with this Court on March 19, 1979.

REASONS FOR DENYING CERTIORARI

POINT I

Due process does not require a factual hearing when the question to be resolved is purely one of law.

Petitioner De Carlo argues that he was entitled to a factual hearing in the state courts of New Jersey to determine whether the crime of which he was convicted evinces moral turpitude. As a matter of New Jersey law, a public employee forfeits his office upon conviction of a crime of moral turpitude. N.J.S.A. 2A:135-9. The State submits that in appropriate cases the determination of whether a particular offense comes within the ambit of the forfeiture statute is a question of law, requiring no factual hearing.

It is well-settled that certain offenses *per se* evince moral turpitude, permitting various collateral consequences to attach based solely on the record of the judgment of conviction. For example, "[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." *Jordan* v. *DeGeorge,* 341 U.S. 223, 227 (1951). When a conviction plainly evinces moral turpitude, a court will not look behind the record of conviction to ascertain whether there may be mitigating factors. See, *e.g., Jordan* v. *DeGeorge, supra* (conspiracy to defraud on payment of federal tax); *United States ex rel. Volpe* v. *Smith,* 289 U.S. 422 (1933) (counterfeiting); *Winestock* v. *Immigration and Naturalization Service,* 576 F.2d 234 (9 Cir. 1978) (dealing with counterfeit obligations); *Lozano-Giron* v. *Immigration and Naturalization Service,* 506 F.2d 1073, 1076 (7 Cir. 1974) (possession of counterfeit obligations); *Marciano* v. *Immigration and Naturalization Service,* 450 F.2d 1022 (8 Cir. 1971), *cert.* den. 405 U.S. 997 (1972) (statutory rape); *Morgano* v. *Pilliod,*

299 F.2d 217, 220 (7 Cir. 1962), *cert.* den. 370 U.S. 924 (1962) (conspiracy to defraud).

Thus, in *Soetarto* v. *Immigration and Naturalization Service,* 516 F.2d 778 (7 Cir. 1975), the Court of Appeals for the Seventh Circuit refused to examine the circumstances surrounding an alien's conviction for theft some years previously in the Netherlands. Reasoning that "theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen," the court refused "to try the foreign crimes *de novo*" and affirmed the final order of the Board of Immigration Appeals deporting the petitioner. 516 F.2d at 780-781.

So too, in *Otash* v. *Bureau of Private Investigators and Adjusters,* 41 Cal.Rptr. 263, 230 Cal.App.2d 568 (Cal.App. 1964), a private investigator argued that the court should consider the level and exact nature of the offense for which he was convicted prior to making a determination of moral turpitude for the purposes of license revocation. The court rejected this contention, ruling that "[w]hether a person has been convicted of a crime involving moral turpitude is a question of law and not of fact." 41 Cal.Rptr. at 266. Under this interpretation, the conviction itself is "the operative fact upon which disciplinary action may be imposed," *id.* at 267, and all that remains is to analyze the elements of the crime to determine whether it embraces conduct which is contrary to justice, honesty and good morals. *Id.* at 266.

Similarly, in *In re Madden,* 184 A.2d 204 (D.C. Mun. 1962), the Municipal Court of Appeals for the District of Columbia was confronted with an appeal from an order denying a renewal of a bondsman's license, predicated on the applicant's conviction for filing fraudulent income tax returns. The applicable statute provided that no person who has ever been convicted of any offense involving

moral turpitude shall be permitted to engage in the business of becoming surety upon bonds in criminal cases. The court analyzed the issue presented as a pure question of law:

> The statute is plain and unambiguous. In order to obtain a license the applicant must be a person who has never been convicted of an offense involving moral turpitude. Conviction of such an offense automatically precludes qualification. The courts have no latitude or discretion in the matter and must follow the plain mandate of the statute. We are therefore presented with only one question: whether the crime for which Madden stands convicted is an "offense involving moral turpitude" within the meaning of the statute just cited. 184 A.2d at 205 (citation omitted).

From these cases it is quite clear that a determination of whether moral turpitude may be inferred from a criminal conviction must be based upon an analysis of the elements of the crime. Equally clear is the proposition that when determinations turn solely on the law, due process does not require a factual hearing. See, *e.g.*, *Dixon* v. *Love*, —— U.S. ——, 97 S.Ct. 1723, 1729 (1977) (concurring opinion); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *Townsend* v. *Sain*, 372 U.S. 293, 312-319 (1963).

The precedents in New Jersey, as elsewhere, indicate that in appropriate cases a conclusion of moral turpitude may be reached as a matter of law based on the fact of conviction. *DeMoura* v. *Newark*, 90 N.J. Super. 225, 227-228, 217 A.2d 19, 21 (App. Div.), certif. den. 46 N.J. 605, 218 A.2d 644 (1966) (filing false income tax return); *Weinstein* v. *Division of Alcoholic Beverage Control*, 70

N.J. Super. 164, 168-169, 175 A.2d 262, 264 (App. Div. 1961) (possession of stolen goods); *cf. Makwinski* v. *State*, 76 N.J. 87, 385 A.2d 1227 (1978) (misconduct in office, which need not involve *mens rea*, held not to constitute moral turpitude; ruling limited to unique facts of case); *Gauli* v. *Board of Trustees*, 143 N.J. Super. 480, 482-83, 363 A.2d 911, 912-913 (App. Div. 1976) (possession of weapon).

In the instant case Petitioner's conviction necessarily involves moral turpitude. Conspiracy is "invested with a potentiality for evil that renders the plans criminal in themselves. . . ." *State* v. *Carbone*, 10 N.J. 329, 91 A.2d 571, 575 (1952). Indeed, a conspiratorial agreement may at times pose an even greater evil than the substantive offense "for the conspiracy may lead to other substantive offenses of a like sort and perhaps to habitual practices." *State* v. *Lavary*, 152 N.J. Super. 413, 377 A.2d 1255, 1260 (Law Div. 1977).

The objects of the conspiracy for which defendant was convicted were the perversion of the administration of the bidding laws and the violation of the criminal laws forbidding misconduct in office by public officials. The public bidding statutes are designed "'to secure competition and to guard against favoritism, improvidence, extravagance and corruption.'" *Trap Rock Industries, Inc.* v. *Kohl*, 59 N.J. 471, 479, 284 A.2d 161, 165 (1971); *Pied Piper Ice Cream, Inc.* v. *Essex County Park Commission*, 132 N.J. Super. 480, 484, 334 A.2d 337, 340 (App. Div. 1975). A conspiracy to circumvent public bidding undermines "the fundamental assumption that the affairs of government should be conducted in an atmosphere free of corrupt influences." *State* v. *Sherwin*, 127 N.J. Super. 370, 379, 317 A.2d 414, 419 (App. Div.), certif. den. 65 N.J. 569, 325 A.2d 703 (1974), *cert* den. 419 U.S. 801 (1975).

Official misconduct, the alternative goal of the conspiracy, amounts to "corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office." *State* v. *Begyn,* 34 N.J. 35, 49, 167 A.2d 161, 168 (1961). The essence of the crime is wrongful action by a public official "done with 'evil motive or in bad faith and not honestly.'" *State* v. *Schultz,* 71 N.J. 590, 601, 367 A.2d 423, 429 (1976). Such misconduct strikes at the heart of government and is inconsistent with the fiduciary obligation of officials to "transact their business frankly and openly in the light of public scrutiny." *Driscoll* v. *Burlington-Bristol Bridge Co.,* 8 N.J. 433, 475, 86 A.2d 201, 221 (1952), *cert.* den. 344 U.S. 838 (1952).

Defendant's crime thus necessarily resulted in a "fraud upon the State." (A.3) As the Superior Court, Law Division, observed:

> The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law. (A.3)

The insidious spread of corrupt officials, whether acting from favoritism or venality, certainly offends the common moral sense prevailing throughout the community. Moreover, the secret award of public contracts not only invites corruption but also drains the public treasury by circumventing competitive bids. Simply stated, "the public was cheated." (A.3).

Accordingly, from the intrinsic fraud and dishonesty evinced by Petitioner's conviction, the courts of New Jersey properly concluded as a matter of law that Petitioner

must forfeit his office by virtue of his moral turpitude. *Jordan* v. *DeGeorge, supra,* 341 U.S. at 227. Petitioner was not entitled to a factual hearing under these circumstances, and this Court should deny his petition for writ of certiorari.

CONCLUSION

For the reasons which are set forth herein, it is respectfully urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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